

Compensating and preventing damage: is there any future left for tort law?

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1. Introduction

[287] Europe is witnessing an ongoing debate amongst scholars, practitioners, and policy makers on the need for tort reform, especially with regard to the field of personal injury.¹ Although the call for reform has not been voiced as distinctly as in the United States of America, there is a growing number of incidents that points towards a central question for European tort law scholars: is there any future left for tort law when it comes to compensating and preventing death and personal injury?²

Tort law is a set of rules, predominant in virtually all European legal systems, that has a number of concurring and sometimes diverging goals. In theory, tort law rules aim at preventing or discouraging specific unlawful behaviour that increases the risk of undesirable damage. At the same time the tort system is mainly focussed on compensating damage after the event. So, in effect, the general idea of the system is that by obliging the tortfeasor to compensate damages *after* the event, he is thus encouraged to act with the appropriate level of care before the event in order to prevent the event from happening.

In the area of death and personal injury, this theoretical framework of tort law with its twofold objective³ is not always reflected by practice. The causes are manifold and closely related. In this short paper, I will present a collection of

¹ Bill W. Dufwa himself has written extensively on this subject. See, e.g., Bill W. Dufwa, 'The Swedish Model of Personal Injury Compensation Law Reconsidered', in: *Ulrich Magnus and Jaap Spier* (ed.), *European Tort Law - Liber Amicorum for Helmut Koziol*, 2000, pp. 109 ff. and Bill W. Dufwa, 'Collectivization of Tort Law', 48 *Scandinavian Studies in Law* (2003), pp. 51 ff.

² The list of publications on this topic is long. I will not try to provide a complete set of references. See, e.g., with further references, *P. Cane*, *Atiyah's Accidents, Compensation and the Law*, 1999, *Don Dewees*, *David Duff and Michael Trebilcock*, *Exploring the Domain of Accident Law - Taking the facts seriously*, 1996, *Jos Dute*, *Michael G. Faure and Helmut Koziol*, *No-Fault Compensation in the Health Care Sector*, 2004, *Jerry J. Phillips and Stephen Chippendale*, *Who pays for car accidents? The Fault versus No-Fault Insurance Debate*, 2002, *Terence G. Ison*, *The forensic lottery*, 1967, *Stephen D. Sugarman*, *Doing Away With Personal Injury Law*, 1989, *P.S. Atiyah*, *The Damages Lottery*, 1997, *Donald Harris*, *Mavis Maclean*, *Hazel Genn*, *Sally Lloyd-Bostock*, *Paul Fenn*, *Peter Corfield and Yvonne Brittan*, *Compensation and Support for Illness and Injury*, 1984.

³ I will not address the question whether the tort system has any additional goals; please note that some authors argue that *loss spreading* is a social goal of tort law systems as well.

plausible [288] and proven causes and how they might be redressed.⁴ First, I will present a short overview of the causes that have been identified so far (paragraphs 2 and 3). Then, I will focus on possible alternatives for and adjustments to the current tort systems that could help to effectively achieve the twofold objective (paragraph 4). Finally, I will address the future research questions that, in my mind, should be on the agenda of European tort law scholars for the coming years (paragraph 5).⁵

2. Aiming at prevention through the instrument of compensation; does it really work?

In the field of personal injury, tort law practice is primarily focussed on compensating victims after the event. The underlying principle of tort law, however, stresses that tort law also aims at providing precautionary incentives to potential tortfeasors before the event. This seems logical, because if compensation of victims was the sole purpose of tort law there would be no point in linking compensation to a specific event for which someone else bears responsibility.⁶ If the focus was in fact exclusively on compensation, then surely a more rational distribution of scarce means would have to be considered.

The twofold objective of tort law leads us to the question whether (and to what extent) tort law succeeds in either of these objectives. With regard to prevention it seems plausible to distinguish between *repeat players* and *one shotters*. The latter category mainly consists of private persons that either cause damage intentionally or negligently, or that bear the risk of a specific adverse event (e.g., strict liability for children, defective premises, animals). If personal injury follows from any of these events, most private persons have a personal liability insurance that covers the consequences.⁷ The ‘private tortfeasor’ typically does not suffer financially from being held liable, which leads me to believe that in these cases the incentive effect, if any, is likely to be reduced.⁸ Consequently, it depends on the insurance companies’ policy (i.e., the use of, e.g., merit rating, deductibles, exclusions, et cetera) whether any of the financial incentives of tort law are in fact passed on to the tortfeasor.

I expect that the picture would not change dramatically if liability insurance policies were unavailable for accidents caused by private individuals. If we consider traffic accidents, the typical domain of tort practice involving individual tortfeasors, we would have to measure whether drivers would drive more carefully and the number of accidents would drop if there was no comprehensive car insurance. [289] Even though this lack of insurance coverage

⁴ The paper is restricted to the European legal systems, for the simple reason that other western legal systems (notably the United States tort system) have a number of features (e.g., punitive damages, remuneration for legal services, jury decisions, a dissimilar liability insurance market) that render comparison in this respect quite difficult.

⁵ The focus of attention is on the area of tortious liability for death and personal injury.

⁶ Tort law should also be seen as a means of expressing responsibility, which in itself has a societal function. Cf., e.g., *David Howarth*, Three forms of responsibility: on the relationship between tort law and the welfare state, 60 *Cambridge L.J.* 2001, p. 572.

⁷ Remember that tortfeasors in Europe do not carry the yoke of punitive damages.

⁸ On *moral hazard* in insurance contracting, see, e.g., *Robert Cooter and Thomas Ulen*, *Law & Economics*, 2000, p. 333. Note, again, that I am not referring to the American tort law system or to its liability insurance market.

would expose car owners to the full and uninsured liability burden (no doubt leaving a lot of victims without compensation), I still doubt that we would in fact experience such a drop in the number of accidents. Most traffic accidents happen as a result of incidental inadvertence or the human incapability to deal with unexpected road situations. These accidents are bound to happen and the slight chance that a driver can be held liable after an accident will presumably provide a weak incentive to that particular individual and an even weaker incentive to other road-users. Individual and incidental tortfeasors are not fully rational in adjusting their behaviour to the appropriate level of care, neither do they always have accurate information on the level of care actually required before the event. So, we could assume that these *one-shotters* are not being targeted with full effect by the tort incentive.⁹ In terms of accident avoidance, my guess is that the incentives provided by regulatory instruments such as criminal law sanctions combined with regular supervision are more effective in the domain of individual torts.¹⁰

Admittedly, the cases of intentional wrongdoing by private individuals present a different picture altogether. Intentional torts are nearly always excluded from liability insurance coverage.¹¹ Hence, in theory that exclusion would enhance the precautionary incentive of tort law. Nevertheless, we should not overestimate the incentive effect in this category of cases. Intentionally inflicted bodily harm is the *métier* of the drunk, the irresponsible, and the criminal. Therefore, it lies within the domain of criminal prosecution, and experience tells us that financial incentives – in terms of the threat of having to compensate – have a limited impact on this set of tortfeasors.¹²

To conclude, I would speculate that tort law has little grasp on preventing either incidental negligence or intentional wrongdoing by private individuals. Instinctively, I would assume that the tort law incentive has more impact on the ‘corporate tortfeasor’: businesses and institutions that are being held liable for not preventing certain accidents. If a corporate tortfeasor is liable for a specific event, and this type of event is likely to happen repeatedly, then the likelihood increases that this tortfeasor or others in a comparable situation will prevent similar events from occurring in the future.¹³ Thus, we could *assume* that clear tort rules provide corporate tortfeasors with an incentive for preventing death and personal injury. Unfortunately, with regard to the European legal systems there is no conclusive empirical evidence that underpins this assumption. Obtaining such evidence would in fact be quite difficult, because the precautionary incentive seems to be distorted by the widespread availability of corporate liability insurance. Liability insurance policies [290] still cover most of the personal injury cases involving repeat player corporate tortfeasors. Therefore, the incentive effect could perhaps be measured best in the

⁹ Note, again, that I am not referring to the American tort law system or to its liability insurance market.

¹⁰ To my knowledge, there is no conclusive empirical evidence either supporting or attacking this assumption.

¹¹ On the exclusion of intentionally inflicted damage in insurance contracts, see *Jürgen Basedow and Till Fock* (ed.), *Europäisches Versicherungsvertragsrecht*, 2002, p. 101-102.

¹² Their being *judgement proof* has in fact prompted national legislatures to set up special state sponsored compensation funds for victims of criminal acts. See also Council Directive 2004/80/EC of 29 April 2004 (*Official Journal L 261*) relating to compensation for crime victims.

¹³ That is, unless this tortfeasor or group of tortfeasors is *judgement proof*.

areas where there is *no insurability*. Research would have to show whether a shift towards uninsurability prompts corporate tortfeasors to consciously move towards better risk management. However, no comprehensive research results on this issue are available.¹⁴

3. Aiming at compensation through litigation and settlement; does it really work?

Tort law gives the victim the right to be compensated *in full*, that is, not according to need but according to the classical principle of *restitutio in integrum*.¹⁵ Restoration in full, however, is a principle that is not always reflected in practice. If the victim succeeds in bringing together the evidence needed for a claim in tort, he still has to accept that he will usually not be compensated for the entire loss. Sometimes, very real types of damage are not compensated at all (e.g., in some jurisdictions, the losses of relatives of the injured person, or financial losses exceeding a fixed interest rate). Moreover, the time, effort and money spent on the process of claiming itself are hardly ever compensated in full. This is in part due to the fact that most European legal systems provide weak or virtually no incentives for quick settlement of claims, thus potentially dragging the tort process on for years. The law of damages itself can sometimes be an obstacle in the way of swift settlement as well. For instance, the calculation of loss of future earnings is usually postponed until the victim has reached a fairly stable condition which is expected to last. Until that moment, final settlement or compensation is impossible.

A successful claim in part depends on the accessibility of the legal system. Research in some jurisdictions shows that accessibility is far from optimal. Victims experience difficulties in making themselves heard and a fair number of potentially successful claims are not being pursued at all.¹⁶ This could be a reason for concern because such a sub-optimal use of legal rights may also be causing a sub-optimal level of deterrence. What driving forces could be behind this? No clear single cause can be identified, but research has revealed some possible explanations. First, it seems that this is in part a problem outside of tort law, and rather within the scope of the remuneration system for lawyers and the tariff structure of the legal services market. Although originally not a tort law problem, nevertheless these barriers are perceived to be the most bothersome in respect of personal injury claims simply because they withhold compensation from the individuals in society who need it the most: the injured and the bereaved dependent.

Second, the existence of alternative compensation schemes such as social security, compulsory health insurance and widows' pensions may relieve the most [291] pressing needs of the victim and may, to a certain extent, remove the need for claiming.

¹⁴ That is, with regard to European tort law.

¹⁵ On that topic, see, e.g., U. Magnus (ed.) *Unification of Tort Law: Damages*, 2001 p. 188.

¹⁶ See, e.g., *Harris, Maclean, Genn, Lloyd-Bostock, Fenn, Corfield and Brittan*, *Personal Injury Compensation: How Much is Enough? A study of the compensation experiences of victims of personal injury* (Law Com. No 225), 1994, p. 52, and *B. van Velthoven and M. ter Voert*, *Geschilbeslechtingsdelta* 2003, 2004.

Third, victims may not always have the relevant information with regard to their legal rights¹⁷ and if they do have this information they may be reluctant to pursue their claim because of the uncertainty that a court would in fact acknowledge that a tort was committed. To quote the expression used by Atiyah: the tort process is somewhat of a *lottery*.¹⁸ Predicting who will win is problematic, as is predicting the amount in the jackpot: it is hard to predict whether a victim will in fact instigate a claim, and if he does whether he will succeed in the end in proving liability and obtaining full compensation. This element of chance may intimidate victims.

4. Alternatives and Adjustments

Tort is far from perfect. Although it aims both at preventing and compensating, there is little conclusive research into the effectiveness of tort law with regard to either objective. However, the available evidence so far suggests that tort law is performing badly in respect of both objectives. In my mind there is a simple explanation: in most jurisdictions, tort law is a product of a historical accumulation of rules, principles, and case law. Moreover, it is a system operated by lawyers with a great sense of *respect* for this body of law and with relatively little attention for the practical drawbacks and pitfalls that ‘the system’ brings about.

Does this mean that we should abolish tort law altogether? I do not think so. Before any well founded conclusion on abolition of tort law can be drawn we should thoroughly consider the facts. The truth is that we do not know all the relevant facts. In the previous paragraphs I have sought to identify at least one aspect of tort law, i.e. the deterrence of ‘repeat player corporate tortfeasors’ that deserves further empirical enquiries. My *assumption* was that tort law does deter so-called corporate tortfeasors to a certain degree, but we need empiricism to either falsify or confirm this and other assumptions.

Then, we need to ask ourselves whether tort law should deter *more* than it does now. This is a highly current matter because private law remedies are increasingly thought of as alternatives for public control.¹⁹ Can tort law be a truly effective instrument of *private enforcement*? In theory the answer is affirmative. The tort system could be used for real *ex ante* prevention because most legal systems allow individuals, and, to a certain extent, interest groups to file injunction orders in order to *actually* prevent the risk from materialising.²⁰ But it seems that in practice these instruments are hardly ever used – that is, in a consistent and persistent manner – for actually preventing a specific category of unlawful behaviour from [292] spreading. We need hard data that show causes,²¹ and *then* we can start debating possible adjustments.

¹⁷ For this reason I would advocate the extension of government ‘consumer education programs’ to personal injury law.

¹⁸ Atiyah, *supra* note 2.

¹⁹ See on that topic in respect of competition law, e.g., Clifford A. Jones, Private Antitrust Enforcement in Europe: A Policy Analysis and a Reality Check, 27 World Competition 2004, pp. 13 ff.

²⁰ The conditions for such injunctions, however, tend to be quite strict. Possibly, this is an impediment as well.

²¹ Why are interest groups not keen on using injunction procedures? Do procedural rules impede this use? Is the financial burden too heavy? Do the interest groups perceive their respon-

Adopting an alternative for tort should be an *ultimum remedium* because alternative schemes tend to compensate more people with smaller amounts per person, and alternative compensation schemes hardly ever invest in effective prevention of accidents. However, if a scheme can compensate to a fair degree and at the same time improve general prevention, then it should be considered for what it is: a serious alternative. In fact, the experience so far with alternative schemes has not always been promising from the compensation point of view,²² but admittedly some progress could be made with regard to more effective prevention of accidents in specific risk areas such as iatrogenic damage.²³

Nevertheless I would prefer adjusting the existing system in order to enhance effectiveness. Surely, adjustments can be implemented if the case for political necessity is made out. What is fundamental for the success of these adjustments is that no options are excluded and that accepted modifications are evaluated after some time. For instance, if strict liability is expected to compensate more efficiently or fairly in a specific area without any expected change in deterrence, then a shift towards strict liability should at least be considered (and if implemented, then evaluated).

Perhaps adjustments sometimes have to be unorthodox. For instance, a tort system could be combined with a public watchdog that is assigned the task of filing injunction claims against corporate tortfeasors. This may help monitor the implementation of court decisions and may prevent future corporate tortious behaviour. Another example: perhaps tort claims for death and personal injury should be dealt with by specialized and/or centralized rather than regionalized courts. It may even – when combined with procedural rules that would force barristers to actually cooperate with the court rather than procrastinate and frustrate swift proceedings – speed up the procedure and actually support settlement out of court.

5. Future research questions

The previous has been nothing more than a kaleidoscope of problems, their plausible causes and feasible solutions. The problems and their causes seem plausible, but in most cases they lack firm empirical evidence. In my opinion tort law research should focus more on obtaining this evidence. This would help fill the empirical gap in legal scholarship. It would also bring about further research into the possible solutions to the actual deficiencies of tort law. The most far-reaching conclusion of this future research could be that European legal systems would have to make the [293] fundamental shift towards alternative compensation schemes such as no-fault compensation funds, compulsory first party insurance et cetera. However, before announcing the death of tort we should first truly investigate whether the patient is in fact suffering

sibilities differently? Should the law be changed in order to facilitate this private enforcement? Should we introduce some sort of system of punitive damages?

²² See, e.g., M.G. Faure, in: *Dute, Faure and Koziol*, supra note 2, pp. 42 ff.

²³ This could at least be the case when no-fault compensation is combined with a strong safety-enhancing regulatory regime; on the possibilities of such a regime, see, e.g., *Linda T. Kohn, Janet M. Corrigan and Molla S. Donaldson* (ed.), *To Err is Human - Building a Safer Health System*, 2001.

from disease, what the nature of that disease is, and whether a cure can be expected from small doses of adjustments. Then we will have a clearer image of the future, if any, of tort law.